UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JANE DOE, Individually and
As Next Friend of JULIE DOE, a minor,

Plaintiffs,

v.

MYSPACE, INC., and
NEWS CORPORATION,

Defendants.

No. 06-cv-7880 (MGC)

DEFENDANT MYSPACE, INC.'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

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DEFENDANT MYSPACE, INC.'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO DISMISS

Plaintiffs' Opposition to MySpace, Inc.'s Motion to Dismiss primarily challenges MySpace's legal defenses with unsupported legal conclusions and empty rhetoric. To the limited extent that Plaintiffs do attempt to engage the legal issues before the Court, their arguments misstate and obscure the well-established purpose and effect of the relevant law. MySpace offers this Reply to clarify the straightforward issues presented by its Motion to Dismiss. Contemporaneously, MySpace is separately filing with this Court its Reply Memorandum of Law in Further Support of Its Motion to Transfer this case to the United States District Court for the Western District of Texas, Austin Division pursuant to 28 U.S.C. § 1404(a).

I.
ARGUMENTS IN REPLY

A. The Communications Decency Act of 1996 Bars All Claims Against MySpace Arising from Its Publication of Third-Party Content

In a desperate attempt to overcome the broad barrier of immunity erected by the Communications Decency Act of 1996 ("CDA"), Plaintiffs assert two faulty arguments. First, Plaintiffs proffer an insupportably narrow interpretation of the statute – namely that it protects interactive computer services only from defamation claims. Second, Plaintiffs argue that their claims are not barred by the CDA because they are not suing MySpace for publishing third-party content, but rather for allowing Pete Solis and Julie Doe to communicate over the Internet – an empty rhetorical attempt to remove their claims from the spectrum of CDA immunity.

The fallacy of Plaintiffs' arguments is evident from the plain language of the statute and from the wealth of cases applying the CDA's immunity broadly to various torts. MySpace's alleged contribution to Plaintiffs' injuries, i.e., publishing Pete Solis and Julie Doe's communications over the Internet, is the precise conduct that is immune from suit and liability under the CDA. Furthermore, the fallacy of Plaintiffs' arguments is even more apparent when considered in light of the statute's widely recognized policy aim of promoting "the continued development of the Internet and other interactive computer services and interactive media." Because Plaintiffs' strained interpretation of the statute would gut the CDA of its effectiveness in promoting the growth of the Internet, the Court should apply the statute broadly, in line with its plain language, its legislative purpose, and the cases that have applied it.

1. *Plaintiffs' Claims Against MySpace Fall Squarely Within the Types of Claims Barred by the Plain Language of the Communications Decency Act*

The CDA is unambiguous in providing broad immunity to interactive computer services for all claims stemming from their publication of information created by third-party "information content providers." Two separate provisions of the CDA effectuate this immunity scheme. First, § 230(c)(1) provides that an interactive computer service shall not "be treated as the publisher or speaker of any information provided by another information content provider," thus removing the interactive computer service from the causal chain between the third-party content and the resulting injury.[1] Second, § 230(e)(3) states in unmistakably clear terms that interactive computer services are immune from all claims stemming from its publication of such information: "*No cause of action may be brought* and *no liability may be imposed* under any State or local law that is inconsistent with this section."[2]

Thus, nothing on the face of the statute supports Plaintiffs' narrow interpretation that the CDA's immunity applies only to cases involving defamation. The immunity afforded by the statute is broad, explicitly covering all claims arising from an interactive computer service's publication of third-party information. Because § 230(c)(1) breaks the causal chain between the third-party content and the resulting injury, the statute precludes plaintiffs from asserting any claim seeking to hold an interactive computer service liable for the publishing that content.[3]

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[1] 47 U.S.C. § 230(c)(1).

[2] *Id.* at § 230(e)(3) (emphasis added).

The CDA's immunity bars Plaintiffs' claims against MySpace because MySpace's only role in the events that led to Plaintiffs' alleged injuries was its publication of communications between Julie Doe and Pete Solis over the Internet. Plaintiffs attempt to assert in their Opposition papers that their claims against MySpace are about something other than its publication of Julie Doe and Pete Solis's communications, arguing that:

> *Plaintiffs are not suing MySpace for the publication of third-party content.*[4]

However, Plaintiffs' own rhetoric inadvertently reveals that they are doing just that:

> *[R]ather, Plaintiffs' claims rest on MySpace's failure to implement basic safety measures to prevent sexual predators from finding and communicating with children who are on the website.*[5]

In another instance, Plaintiffs allege that they:

> *[S]ued MySpace for allowing sexual predators to regularly communicate with children on its website.*[6]

Thus, while Plaintiffs attempt to characterize their claims against MySpace as involving something other than its publication of third-party content, the argument is nothing more than a rhetorical sleight of hand. It is well-established that where an interactive computer service allows parties to "communicate" over the Internet, whether through e-mail, chat rooms, bulletin boards, or other interactive media, those communications constitute an exchange of "information provided by another information content provider" that is covered by the CDA.[7] This interpretation by the courts follows from the broad definition of "information content provider" under the CDA:

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[3] *See Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1124 (9th Cir. 2003) ("Under § 230(c), therefore, so long as a third party willingly provides the essential published content, the interactive service provider receives full immunity regardless of the specific editing or selection process."); *Parker v. Google, Inc.*, 422 F.Supp.2d 492, 500-01 (E.D. Pa. 2006) (Without examining the specific elements of each of these claims, we note that each claim revolves around the tortious acts of a third party for which Parker holds Google accountable by virtue of its archived USENET system, its website search tool, and its caching system. We agree with Defendant that Google is immune from such state tort claims under § 230 of the CDA.").

[4] Pls.' Mem. of Law in Opposition to Def. MySpace, Inc.'s Motion to Dismiss, at 5.

[5] *Id.*

[6] *Id.* at 6.

> The term "information content provider" means any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.[8]

As persons responsible for the creation of information provided through MySpace.com, Julie Doe and Pete Solis clearly qualify as information content providers under the statute. MySpace's publication of their third-party communications through the Internet is precisely the type of conduct for which the CDA provides it immunity. Therefore, whatever rhetoric Plaintiffs use to characterize their claims against MySpace, it is an inescapable reality that their claims are barred under the plain language of the CDA.

2. *Courts Interpreting the CDA Have Broadly Applied § 230 to Bar Numerous Claims Besides Defamation*

While numerous cases refute Plaintiffs' narrow interpretation, the U.S. District Court for the District of Maryland did so perhaps most succinctly in *Beyond Systems, Inc. v. Keynetics, Inc.*, a case in which the plaintiff offered an identically flawed interpretation of the CDA that the Plaintiffs offer in this case:

> But BSI argues that the CDA only extends to cases in which ISPs are sued in connection with the transmission of defamatory messages and that defamation is not an issue in this case. Rackspace points out, however, quite correctly, that courts have extended the reach of the CDA to immunize ISPs from liability in several settings besides defamation suits.[9]

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[7] *See, e.g., Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003) (Internet chat rooms); *Zeran v. America Online*, 129 F.3d 327, 332 (4th Cir. 1997) (Internet bulletin boards); *Optinrealbig.com, LLC v. Ironport Sys., Inc.*, 323 F.Supp.2d 1037, 1047 (N.D. Cal. 2004) (e-mail); *Blumenthal v. Drudge*, 992 F.Supp. 44, 53 (D.D.C. 1998) (Internet listserv).

[8] 47 U.S.C. § 230(f)(3).

[9] *Beyond Sys., Inc. v. Keynetics, Inc.*, 422 F.Supp.2d 523, 536 (D. Md. 2006).

Indeed, federal and state courts from across the country have uniformly recognized that the CDA's immunity extends far beyond Plaintiffs' narrow interpretation. To date, at least 18 reported cases have applied CDA immunity to bar claims other than defamation, including negligence, fraud, negligent misrepresentation, public nuisance, trespass, tortious interference, intentional infliction of emotional distress, civil conspiracy, as well as claims brought under various civil and criminal statutes.[10] While some of these cases involved claims for defamation as well, there is nothing about the statute or the reasoning in those cases to suggest that they were somehow predicated on the presence of a claim for defamation – a point further bolstered by the fact that many of these cases involved no defamation claim whatsoever.[11]

Rather, the common element in all cases involving CDA immunity is an underlying attempt to hold an interactive computer service liable for its publication of third-party content or for harms flowing from the dissemination of that content. For this reason, Plaintiffs' attempt to distinguish *Carfano*, *Zeran*, and *Prickett* is misplaced. While each of those cases involved claims for defamation, they also involved separate claims, like negligence, intentional infliction of emotion distress, and trespass to real property – all of which were barred by the CDA. Just as in this case, the plaintiffs in *Carfano*, *Zeran*, and *Prickett* attempted to hold an interactive computer service liable for allowing third parties to publish content that caused other third parties to threaten, harass, and endanger them in the offline world. As the *Prickett* court explained in dismissing the negligence, trespass, and intentional infliction of emotional distress claims before it, whatever theory of recovery the plaintiff used to challenge the interactive computer service's conduct, the claims were still premised on the decision to publish or not to publish third-party content, and are therefore barred under the statute:

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[10] *See* Appendix A (listing citations to eighteen cases in which the CDA barred claims other than defamation or libel).

[11] *See id.*

> Additionally, the Plaintiffs argue that the Defendant operated as an information content provider because the Defendant assures the accuracy of its listings via its verification process. . . . "Any such claim by [the Plaintiffs] necessarily treats the [Defendant] as 'publisher' of the content and is therefore barred by § 230." The Plaintiffs' argument that they seek to hold the Defendant liable for its alleged failure to verify the accuracy of the listing does not remove this case from the immunity provided by § 230. "[The Plaintiffs'] claim remains an effort to hold the [Defendant] liable for failing to perform the duties of a publisher."[12]

The Third Circuit reached a similar conclusion in *Green v. America Online*, holding that the plaintiff's negligence claim against AOL was, in essence, a complaint about AOL's publication of harmful content, which actually included a computer virus:

> There is no real dispute that Green's fundamental tort claim is that AOL was negligent in promulgating harmful content and in failing to address certain harmful content on its network. Green thus attempts to hold AOL liable for decisions relating to the monitoring, screening, and deletion of content from its network – actions quintessentially related to a publisher's role. Section 230 "specifically proscribes liability" in such circumstances.[13]

Thus, however Plaintiffs attempt to characterize their claims against MySpace in this case, the essence of their complaint is that MySpace permitted Pete Solis and Julie to communicate with each other by publishing their communications over the Internet. As such, Plaintiffs' claims are nothing more than an impermissible attempt to hold MySpace liable as a "publisher" of third-party content, and are therefore barred by the statute.

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[12] *Prickett v. InfoUSA, Inc.*, No. 4:05-CV-10, 2006 WL 887431, at *3-*4 (E.D. Tex. Mar. 30, 2006).

[13] *Green v. America Online*, 318 F.3d 465, 471 (3d Cir. 2003); *accord Noah v. AOL Time Warner, Inc.*, 261 F.Supp.2d 532, 538-39 (E.D. Va. 2003) ("[R]elying on the fact that his claim is brought under Title II, not state defamation or negligence law, plaintiff contends that the claim treats AOL as the owner of a place of public accommodation, not a "publisher." . . . [P]laintiff contends that AOL is liable for its refusal to intervene and stop the allegedly harassing statements, and requests an injunction requiring AOL to adopt "affirmative measures" to stop such harassment, presumably by screening out the offensive statements and banning the members responsible for them. These allegations make clear that plaintiff seeks to hold AOL liable for its failure to exercise "a publisher's traditional editorial functions-such as deciding whether to publish, withdraw, postpone or alter content." As such, they are barred by § 230 . . . .").

3. *Plaintiffs' Narrow Interpretation of the CDA Would Undermine Its Well-Recognized Legislative Purpose of Encouraging the Development of the Internet*

As MySpace set forth in its Memorandum of Law in Support of its Motion to Dismiss, a broad interpretation of the CDA's immunity provision is necessary to advance Congress's stated policy of promoting "the continued development of the Internet and other interactive computer services and other interactive media."[14] This policy is based on express congressional findings that "[t]he rapidly developing array of Internet and other interactive computer services . . . represent an extraordinary advance in the availability of educational and informational resources to our citizens" and "offer a forum for true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[15] And importantly, Congress observed that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[16]

Courts from across the country have acknowledged that applying the CDA broadly is necessary to effectuate its stated policy objectives.[17] If ever there were doubt over whether this prevailing judicial application reflects the statute's legislative intent, Congress resolved those doubts by expressly endorsing the prevailing view in subsequent legislative history. In 2002, Congress enacted the "Dot Kids Act," which extended § 230 immunity to certain entities involved in the operation of a child-friendly domain.[18] In the Committee Report accompanying the Act, Congress specifically endorsed the broad interpretation of § 230 to cover various claims involving third-party content:

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[14] 47 U.S.C. § 230(b)(1).

[15] *Id.* at § 230(a)(1), (a)(3).

[16] *Id.* at (a)(4).

[17] *See, e.g.*, *Zeran v. America Online*, 129 F.3d 327, 330-31 (4th Cir. 1997); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123-24 (9th Cir. 2003).

[18] The Dot Kids Implementation and Efficiency Act of 2002, Pub. L. 107-317, 116 Stat. 2766 (2002), codified at 47 U.S.C. § 941.

> The Committee notes that ISPs have successfully defended many lawsuits using section 230(c). The courts have correctly interpreted section 230(c), which was aimed at protecting against liability for such claims as negligence (*See, e.g.*, *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 327 (1997)). The Committee intends these interpretations of section 230(c) to be equally applicable to those entities covered by [this new legislation].[19]

In contrast, Plaintiffs' insupportably narrow interpretation of the statute would frustrate its legislative intent and undermine Congress's subsequent endorsement of its prevailing application. Under Plaintiffs' interpretation, all other potential plaintiffs would simply sidestep the CDA by characterizing their claims as ones dealing with harmful "communications" as opposed to third-party content, and instead of asserting claims for defamation, they would assert negligence or some other overlapping theory of recovery. Because this approach would gut the statute of its effectiveness in advancing its important policy aims, it is simply untenable as a matter of statutory construction.

B. Plaintiffs' Assertion that New York Law Should Govern This Case Is Baseless

Without discussing or citing a single legal authority, Plaintiffs assert that New York law should govern this case. Not only does this conclusory assertion directly contradict Plaintiffs' previous judicial admission that Texas law covers their substantive claims,[20] but it is easily refuted by New York's choice of law rules, which make clear that Texas law will govern Plaintiffs' substantive claims.

Under New York's choice of law doctrine, "the law of the jurisdiction where the tort occurred will generally apply because that jurisdiction has greatest interest in regulating behavior within its borders."[21] Plaintiffs argue that the tort in this case occurred in New York because they allege that certain unspecified "decisions" by unidentified "executives" were made in New York. That allegation, however, would not change the choice of law analysis even if it were true. New York law is clear that where various elements of a tort occur in different jurisdictions "the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred," which is "where the plaintiff's injuries occurred.'"[22]

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[19] H.R. Rep. No. 107-449, 2d. Sess., p. 13 (2002).

[20] *See* Plaintiffs.' First Amended Response to Defendants' Special Exceptions, filed in *Doe v. MySpace, Inc.*, No. D-1-GN-002209 (261st Dist. Ct., Travis County, Tex. Sep. 1, 2006) (previously attached as Exhibit F to the Affidavit of Clifford Thau) ("All of Plaintiffs' claims asserted in Plaintiffs' First Amended Original Petition are based on Texas common-law.").

Plaintiffs ask the Court to disregard these well-established choice-of-law principles because New York has millions of MySpace users. This allegation, which is outside the pleadings, has no bearing on the choice of law analysis. Texas, as the second largest state behind California undoubtedly has millions of MySpace users as well, and more importantly, the particular MySpace users in this case are from Texas. Texas's interest in defining the conduct-governing standards in a case involving the alleged rape of a teenager from Texas, by another teenager from Texas, which occurred in Texas, is far greater than New York's general interest in MySpace's responsibility to users in other states.[23]

C. Plaintiffs Completely Mischaracterize the Limited Duty Under Texas Common Law to Prevent Third Parties from Committing Crimes

Plaintiffs completely mischaracterize MySpace's common law no-duty defense in arguing that MySpace "relies on Texas premises liability laws" to establish that it has no duty to prevent its users from falling victim to third-party criminal acts. Plaintiffs further argue that MySpace should be governed by premises liability laws because MySpace.com is "a 'cyber premises' where people directly communicate with each other." This argument is nonsense.

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[21] *Cooney v. Osgood Mach., Inc.*, 612 N.E.2d 277, 280 (N.Y. 1993).

[22] *Schultz v. Boy Scouts of Am., Inc.*, 480 N.E.2d 679, 683 (N.Y. 1985).

[23] *See Schultz v. Boy Scouts of Am.*, 480 N.E.2d 679, 684 (N.Y. 1985) ("[W]hen the conflicting rules involve the appropriate standards of conduct, the law of the place of the tort 'will usually have a predominant, if not exclusive concern.'") (quoting *Babcock v. Jackson*, 191 N.E.2d 279, 284 (N.Y. 1963)).

First, a fundamental principle of MySpace's common law defense is that premises liability standards *do not apply* in this case. As clearly stated in MySpace's Memorandum of Law in Support of its Motion to Dismiss, "the alleged criminal event happened offline, . . . and there is no allegation that MySpace was in control of the premises where the crime occurred." The point of this argument is that MySpace has no special relationship with the parties giving rise to such a duty; Pete Solis is simply one of over 118 million users on MySpace.com who committed a crime in the offline world. Regardless of MySpace's knowledge of similar criminal acts by its users in the offline world, there is no basis under Texas law for holding the owner of a website liable for crimes committed by its users in the offline world; absent a special relationship between the parties, neither party has a duty at common law to prevent the criminal actions of another.

Second, even if there were legal support for Plaintiffs' argument that MySpace is a "cyber premises" that should be held to the same legal standard as a physical premises, the analogy would not apply in this case because the alleged criminal assault did not happen on MySpace's supposed "cyber premises." All that is alleged to have happened on MySpace.com is Julie Doe's voluntary communications with Pete Solis. It was Pete Solis's eventual alleged conduct in the offline world, not on MySpace.com, that resulted in Julie Doe's injuries. Accordingly, MySpace should not be held liable for Pete Solis's criminal conduct even under Plaintiffs' unsupported "cyber premises" liability theory.

D. Plaintiffs Have Failed to Plead Reliance with Particularity as Required Under the Heightened Pleading Standard of Rule 9(b)

Plaintiffs' Opposition papers, like their Complaint, remove any doubt that they have failed to plead their fraud and negligent misrepresentation claims with particularity. In its Motion to Dismiss, MySpace specifically objected to Plaintiffs' fraud allegations on the ground that Plaintiffs failed to plead reliance with particularity. Plaintiffs have done nothing in response to correct this pleading deficiency.

Instead, Plaintiffs maintain that they plead fraud with particularity by identifying misrepresentations made by MySpace "*to the public* through the media."[24] According to Plaintiffs, these allegations "fairly notify MySpace of the misrepresentations at issue." But merely identifying the alleged misrepresentations says nothing about reliance. Plaintiffs' statement that they "relied on the misrepresentations" is nothing more than a conclusory allegation, which fails to specify when they became aware of the statements (if at all) and how they relied on them. To plead reliance with particularity, Plaintiffs claims must rest on *their own reliance* on MySpace's statements, *i.e.*, that Julie Doe (1) heard or read the alleged representations and (2) that she relied on these statements in (a) deciding to join MySpace.com or (b) taking some other step that led directly to the alleged sexual assault.[25] Plaintiffs have done nothing of the sort, and therefore have failed to plead fraud with particularity.

E. Because Plaintiffs Proffer the "Terms of Use Agreement" and "Tips for Parents" as a Basis for Their Misrepresentation Claims, Plaintiffs Cannot Disclaim General Knowledge of or Reliance on Them.

Finally, Plaintiffs attempt to cloud the legal significance of the MySpace Terms of Use Agreement and Tips for Parents – two documents that are obviously fatal to Plaintiffs' fraud and misrepresentation claims – by arguing that the documents are not contractually enforceable. This argument is a red herring. While the Terms of Use Agreement is in fact enforceable against Plaintiffs,[26] for purposes of this Motion, the enforceability of that agreement is not before the Court. The Terms of Use Agreement and Tips for Parents are before the Court not because they are contractual agreements between the parties, but because Plaintiffs proffer these documents as a basis for their fraud and misrepresentation claims. Having used these documents as a sword, Plaintiffs cannot now keep MySpace, or the Court, from employing their language as a shield.

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[24] Plaintiffs' Memorandum of Law in Opposition to Defendant MySpace, Inc.'s Motion to Dismiss, at 14 (emphasis added). Plaintiffs contend that Rule 9(b) is intended to provide fair notice of claims sounding in fraud, but they neglect to mention that the rule is also intended to protect "defendants' reputation and goodwill from unfounded charges" and to discourage "strike suits." *In re Leslie Fay Companies, Inc. Secs. Litig.*, 918 F.Supp. 749, 767 (S.D.N.Y. 1996), cited in Memorandum in Opposition to Motion to Dismiss at 14.

[25] *See In re Enron Corp. Secs., Derivative & "ERISA" Litig.*, 388 F.Supp.2d 780, 785 (S.D. Tex. 2005) ("To demonstrate reliance, a plaintiff suing for fraud must allege and prove that he knew of and was induced by defendant's representations, although those representations need not be the sole reason he entered into the transaction.") (citing *Marburger v. Seminole Pipeline Co.*, 957 S.W.2d 82, 86 n. 5 (Tex. App.—Houston [14th Dist.] 1997, no writ)); *Johnson & Johnson Med., Inc. v. Sanchez*, 924 S.W.2d 925, 930 (Tex. 1996) (overturning the jury's verdict of fraud because the plaintiff failed to show that she relied on the defendant's statements that it would call her back to work when a job became available, e.g., by turning down other job opportunities).

Specifically, the Terms of Use Agreement and Tips for Parents are expressly incorporated in Paragraph 24 of Plaintiffs' Verified Complaint as the basis of Plaintiffs' misrepresentation claims:

> 24. As of June 19, 2006, MySpace also expressly represents these policies in the "Terms and Conditions" section on MySpace. MySpace claims that it is "illegal" or "prohibited" to "solicit personal information from anyone under 18." MySpace also has a section entitled "Tips for Parents" where they state "MySpace members must be 14 years of age or older."

Thus, Plaintiffs claim actually quote specific provisions of those two documents as the basis for their fraud and misrepresentation claims – the same "fine print" that Plaintiffs allege MySpace unfairly invokes in its defense.[27] While Plaintiffs have not plead reliance with particularity, they necessarily must have read and relied on the documents in some way if they are to form the basis of their alleged misrepresentation claims (assuming Plaintiffs bring the fraud and misrepresentation claims in good faith). MySpace logically relies upon these same documents to establish that, on the face of the Plaintiffs' Complaint, they have failed to plead a viable claim for fraud or negligent misrepresentation.

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[26] Specifically, Plaintiffs attempt to create fact issues over the enforceability of the MySpace Terms of Use Agreement by asserting that the agreement is voidable because Julie Doe was minor we she agreed to its terms, and by asserting that whether Julie Doe read or understood the Terms of Use Agreement is a fact issue. To the contrary, the contract is not voidable because Julie Doe misrepresented herself to be 19 years old when she created her MySpace profile (a point that Plaintiffs do not deny) and because MySpace justifiably relied on her misrepresentation. *See Evans v. Henry*, 230 S.W.2d 620, 621 (Tex.Civ.App. 1950) ("The rule is well settled in this State that if an infant induces a seller to enter into a contract of sale by fraudulently representing himself to be a person *sui juris*, then he is estopped to disaffirm his contract."). Furthermore, it is well-established that a "click-wrap agreement" is enforceable regardless of whether the user read or understood its terms, so long as the user manifests its asset to the contract by clicking "I Accept" or the like. *See Hotels.com, L.P. v. Canales*, 195 S.W.3d 147, 155-56 (Tex. App.—San Antonio 2006); *see also Specht v. Netscape Communications Corp.*, 150 F.Supp.2d 585, 594 (S.D.N.Y. 2001) ("The few courts that have had occasion to consider click-wrap contracts have held them to be valid and enforceable.").

[27] Plaintiffs' Memorandum of Law in Opposition to Defendant MySpace, Inc.'s Motion to Dismiss, at 15.

The absurdity of Plaintiffs' fraud claim becomes evident when considering the unambiguous terms of these documents, which Plaintiffs have incorporated into their Complaint. For example, one quote that Plaintiffs' offer in support of their misrepresentation claims – that "MySpace members must be 14 years of age or older" – is surrounded by sentences (omitted by Plaintiffs) that completely undermine Plaintiffs' claims that MySpace misrepresented its ability to perform age verification. Read in context, the Tips for Parents actually state:

> **Kids shouldn't lie about how old they are. MySpace members must be 14 years of age or older.** We take extra precautions to protect our younger members and we are not able to do so if they do not identify themselves as such. MySpace will delete users whom we find to be younger than 14, or those misrepresenting their age.[28]

Thus, MySpace's defense, which Plaintiffs' deride as "truly bizarre," is actually quite simple: when read in context, the documents that Plaintiffs incorporate in their Complaint as a basis for their fraud claims *actually contain no misrepresentations*. In fact, these documents clearly explain that MySpace is unable to verify the age or identity of its users, and they caution users about the dangers of meeting strangers online. Because the Plaintiffs quote these documents as the basis for their misrepresentation claims, MySpace need not prove that Plaintiffs read or relied upon their terms. And given Plaintiffs' offensive use of these documents for their own purposes, they cannot legitimately challenge MySpace's defensive use of the same documents.

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[28] *Compare* Plaintiffs' Verified Complaint, at ¶ 24 *with* MySpace Tips for Parents, cited and incorporated by reference in Verified Compl. at ¶ 24 (emphasis in original) (attached to MySpace's Motion to Dismiss as Ex. B to the Polesetsky Aff.).

II.
CONCLUSION

The Plaintiffs' Opposition offers no serious defense of the legal defects in its Verified Complaint. Accordingly, for the reasons stated herein and in MySpace, Inc.'s Memorandum of Law in Support of its Motion to Dismiss, MySpace prays that the Court dismiss all claims asserted against.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of November, 2006, this Reply Memorandum in Further Support of MySpace, Inc.'s Motion to Dismiss was served upon counsel for all parties via the Court's Electronic Notification System.

Clifford Thau

Cliff Thau

APPENDIX A

Case Citation	CDA Application
Barnes v. Yahoo!, Inc., No. Civ. 05-926-AA, 2005 WL 3005602, at *4 (D. Or. Nov. 8, 2005).	CDA bars claims for negligence resulting in personal injury.
Barrett v. Fonorow, 799 N.E.2d 916 (Ill. App. Ct. 2003).	CDA bars claims for defamation, false light, and invasion of privacy.
Ben Ezra, Weinstein, & Co., Inc. v. Am. Online, Inc., 206 F.3d 980, 986 (10th Cir. 2000).	CDA bars claims for defamation and negligence.
Beyond Sys., Inc. v. Keynetics, Inc., 422 F.Supp.2d 523, 537 (D. Md. 2006).	CDA bars claims for violation of the Maryland Commercial Electronic Mail Act.
Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1125 (9th Cir. 2003).	CDA bars claims for invasion of privacy, misappropriation of right of publicity, defamation, and negligence.
Dimeo v. Max, 433 F.Supp.2d 523, 531, 532 (E.D. Pa. 2006).	CDA bars claims for defamation and intentional infliction of emotional distress.
Doe v. Am. Online, Inc., 783 So.2d 1010, 1013-17 (Fla. 2001).	CDA bars claims for negligent failure to monitor internet communications.
Doe v. GTE Corp., 347 F.3d 655, 658-62 (7th Cir. 2003).	CDA bars public nuisance claim.
Donato v. Moldow, 865 A.2d 711, 718-28 (N.J. Super. Ct. App. Div. 2005).	CDA bars claims for defamation, harassment, and intentional infliction of emotional distress.
Green v. Am. Online, 318 F.3d 465, 472 (3d Cir. 2003).	CDA bars claim for negligent failure to properly police network.
Jane Doe One v. Oliver, 755 A.2d 1000, 1002-04 (Conn. Super. Ct. 2000).	CDA bars claims for negligence, intentional infliction of emotional distress, intentional nuisance, and breach of contract.
Noah v. AOL Time Warner Inc., 261 F.Supp.2d 532, 540 (E.D. Va. 2003).	CDA bars claims to recover for discrimination in a place of public accommodation under Title II of the Civil Rights Act of 1964.
Novak v. Overture Servs., Inc., 309 F.Supp.2d 446, 453 (E.D.N.Y. 2004).	CDA bars claim for tortious interference with contractual relations.
Parker v. Google, Inc., 422 F.Supp.2d 492, 500-01 (E.D. Pa. 2006).	CDA bars claims for invasion of privacy, negligence, and defamation.
PatentWizard, Inc. v. Kinko's, Inc., 163 F.Supp.2d 1069, 1072 (D.S.D. 2001).	CDA bars claims for aiding and abetting defamation and aiding and abetting interference with prospective business relationships
Prickett v. InfoUSA, Inc., No. 4:05-CV-10,	CDA bars claims for invasion of

2006 WL 887431 (E.D. Tex. Mar. 30, 2006).	privacy, trespass to real property, private nuisance, negligence, intentional infliction of emotional distress, and defamation.
Schneider v. Amazon.com, Inc., 31 P.3d 37 (Wash. Ct. App. 2001).	CDA bars claims for negligent misrepresentation, tortious interference, breach of contract, and defamation.
Zeran v. Am. Online, Inc., 129 F.3d 327, 334 (4th Cir. 1997).	CDA bars negligence claims.